**NO. 84929-3**

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In Re the Personal Restraint Petition of;

**PATRICK L. MORRIS,**
Petitioner.

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FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR SKAGIT COUNTY

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# STATE'S ANSWER TO WACDL AMICUS BRIEF

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## I. SUMMARY OF ISSUES AND RESPONSES

Patrick Morris was convicted of two counts of Child Molestation in the First Degree and one count of Rape of a Child in the First Degree. He filed this personal restraint petition claiming that there was a violation of his right to public trial by a portion of *voir dire* held in chambers. Because the petition was timely, this case does not present any issues as to the applicability of the time bar statute. RCW 10.73.090.

The State has opposed Morris' petition for several reasons. The State has argued that Morris has not established that there was a closure, any error was invited, any error was not preserved, Morris is asking for application of a new rule of criminal procedure to his case and any remedy should fit the violation alleged.

## II. ISSUES RAISED BY WACDL

Amicus WACDL now argues that Morris' 2004 convictions for child molestation and rape of a child should be reversed because *any* courtroom closure without an adequate pre-closure inquiry by the trial court is structural error that is not subject to harmless error review on direct appeal and is prejudicial per se in a collateral attack on the judgment. Such an argument is predicated on a number of premises about open courts and structural error that have never been decided

by the United States Supreme Court.

First, Supreme Court authority actually suggests that a different standard of review should apply as to open courtroom claims brought in a collateral attack. In a collateral attack on the judgment, principles of finality demand that the petitioner show that the *closure* was improper, i.e. that a structural error actually occurred, not simply that the trial court failed to develop a complete record for closure.

Second, not every courtroom closure is structural error; a court has discretion to close courts for a variety of reasons, including to question jurors on sensitive topics. Thus, a failure to perform Bone-Club analysis does not automatically mean that structural error occurred, it simply means that it cannot be determined from the existing record that the closure was proper.

Third, where a defendant has clearly waived his personal right to be present, as Morris did, he should not be allowed to use the civil law proceeding permitted for collateral review in order to vindicate the rights of others. The right of review exists to correct his personal, unlawful restraint, not to correct a more abstract societal harm that may have occurred by the short closure of this *voir dire.*

Fourth, the State respectfully points out that this Court need not reach any of WACDL's arguments if it decides, as the State has

previously argued, that Morris invited or waived the issue of whether private questioning of jurors was proper.

Fifth, WACDL errs by asking this Court to find ineffective assistance of *appellate* counsel without making any inquiry whatsoever into the effectiveness of *trial* counsel.

## II. STATEMENT OF THE CASE

During voire dire the jurors completed questionnaires allowing the jurors to answer some questions privately. 6/8/04 RP 13. Eleven jurors indicated they wished to talk privately. 6/8/04 RP 45. The court excused the remainder of the panel to return at a later time. The sole notation by the court reporter regarding where or how the question was conducted states "(In chambers)." 6/8/04 RP 46.

For purposes of this answer, the most salient part of the record is the portion of *voir dire* where Morris personally and expressly waived his right to be present during chambers questioning of jurors so they would be more forthcoming. The colloquy on this issue with Morris and defense counsel, Mr. Volluz, was as follows:

> Mr. Volluz: I've spoken to my client about the sensitive nature of what's going on back here. He understands he has a right to be present. We also spoke about the fact it would be more likely for jurors to be more forthcoming with what they are talking about if he were not in the room. He has agreed to waive his presence, if that's agreeable to everybody.
>
> The Court: Is that right, Mr. Morris?

The Defendant: Yes.

The Court: Thank you, sir.

6/8/04 RP 46. Defense counsel then used the process of questioning jurors in chambers about issues pertaining to their experiences related to sexual offenses to excuse six of the jurors for cause due to bias revealed. 6/8/04 RP 50, 54, 62, 68, 76 & 86.

## IV. ARGUMENT

### 1. WHETHER AND WHEN TO APPLY STRUCTURAL ERROR ON COLLATERAL REVIEW IS AN OPEN QUESTION IN THE SUPREME COURT.

WACDL argues that any error considered structural on direct appeal must be considered structural on collateral attack. In support of this argument, WACDL cites five structural error cases. Br. of WACDL at 7. It then argues that "all of the above-cited cases were collateral attacks" but notes that three of the five were cases on direct appeal, not collateral attack. Id. In other words, WACDL cites two cases, not five, where the Supreme Court has applied structural error on collateral attack.

Those two cases, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 409 (1963) and McKaskle v. Wiggins, 465 U.S.

168, 104 S. Ct. 944, 79 L.Ed.2d 122 (1984)[1] were decided before Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710, 123 L.Ed.2d 353, *rehearing denied*, 508 U.S. 968, 113 S.Ct 2951, 124 L.Ed. 1557 (1993), the case that established a different harmless error standard for collateral attack than for direct review. Brecht presented an issue of trial error, not structural error, and it held that a more lenient harmless error standard was appropriate on collateral review. Brecht explains how the distinction is rooted in the fundamental difference between direct and collateral review.

> The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence. . . . In keeping with this distinction, the writ of habeas corpus has historically been regarded as an extraordinary remedy, a bulwark against convictions that violate fundamental fairness. . . . Those few who are ultimately successful [in obtaining habeas relief] are persons whom society has grievously wronged and for whom belated liberation is little enough compensation. . . . Accordingly, it hardly bears repeating that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.

Brecht, 507 U.S. at 633-34 (internal citations and quotations omitted). The Court ultimately concluded that "[o]verturning final and presumptively correct convictions on collateral review because

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[1] Gideon v. Wainwright and McKaskle v. Wiggins also involved right to counsel and self-representation which were raised in the trial court.

the State cannot prove that an error is harmless under Chapman undermines the States' interest in finality and infringes upon their sovereignty over criminal matters." The issue of structural error was not before the Court in Brecht but the rationale in Brecht certainly supports an argument that, even as to structural errors, a different standard of review should apply. WACDL cites no case where the Court has said this important distinction between direct and collateral review is irrelevant where the claimed error is a structural error rather than a trial error. Such a holding should not be presumed, especially because the Court has distinguished between direct and collateral review in contexts other than harmless error. Brecht, 507 U.S at 634 (noting differing standards on habeas review involving the application of new rules of criminal procedure, the right to counsel on collateral attacks, and "plain error" rule versus "cause and prejudice" standard).

In any event, it certainly does not follow from WACDL's arguments that "the Brecht distinction between harmless error standards applicable on direct or collateral review . . . is irrelevant to structural defects." Br. of WACDL at 10.

Moreover, substantial changes have occurred to federal review of state court convictions since Brecht. See Antiterrorism and

Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996). Under AEDPA, federal habeas relief shall not be granted from state convictions "unless the adjudication of the claim ... involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d) These new standards supersede Brecht. Hale v. Gibson, 227 F.3d 1298, 1324 (2000). WACDL provides no analysis as to whether the new standards of review supplant Brecht as to structural errors. Thus, there is no authority suggesting that the Supreme Court will mandate reversal for structural error even on collateral attack of a state court conviction.

In Washington, this Court has held that it will decide on a case-by-case basis whether to apply the same standards on direct and collateral review. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992).

> We have limited the availability of collateral relief because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders. Hagler, 97 Wn.2d at 824, 650 P.2d 1103. **Therefore, we decline to adopt any rule which would categorically equate per se prejudice on collateral review with per se prejudice on direct review.** Although some errors which result in per se prejudice on direct review will also be per se prejudicial on collateral attack, the interests of finality

> of litigation demand that a higher standard be satisfied in a collateral proceeding.

Id. at 329 (emphasis added). "In the absence of per se prejudice, petitioner must show the error worked to his actual and substantial prejudice in order to prevail." Id. at 329.

As argued in the state's initial briefing, in the context of courtroom closure claims, there is reason to distinguish between direct appeal and collateral review.

**2. FOR PURPOSES OF COLLATERAL ATTACK, A COURTROOM CLOSURE IS PREJUDICIAL PER SE ONLY WHERE THE CLOSURE ITSELF WAS PLAINLY WRONG.**

In each of the open courtroom cases decided by the Supreme Court closure was facially indefensible. Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (six months of *voir dire* closed based on a short period where private questioning might have been needed); Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (closure of entire suppression hearing); Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 175 L.Ed. 2d 675 (2010) (public and family member barred from *voir dire*). In each of these direct appeal cases the error was apparent and the Court was not willing to presume that the closure was proper. Once the court

determined closure was erroneous, prejudice was presumed.

However, there is an important distinction between open courtroom claims and other "structural" errors. Trials by a biased judge, trials without a lawyer, or trials by a jury that has been misinstructed on reasonable doubt are always wrong. But courtroom closure is permissible so long as the trial court makes an adequate inquiry. Thus, not all courtroom closures are error. As one appellate opinion has explained:

> . . . the inclusion of Waller in the list of cases exposing "structural error" is problematic. It is true that "the benefits of the public trial are frequently intangible, difficult to prove, or a matter of chance." . . .Hence, violation of the right satisfies some of the rationale for setting aside the harmless error standard.
>
> However, Waller itself stated that "the Court has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." . . . In other words, there are certain cases in which a court is able to justify closing a trial to the public. . . .
>
> The difficulty in assessing whether a defendant's public trial right has been violated counters the difficulty in assessing the *effect* of a violation upon the defendant. This is surely one reason why Waller indicated that violation of the right to a public trial is not subject to "automatic reversal" in the same way as violation of certain other rights. Waller's case was remanded to the trial court for a suppression hearing after the Court determined that a violation had occurred. . . ..
>
> The Waller Court agreed with the proposition that "the defendant should not be required to prove specific prejudice in order to obtain *relief* for a violation of the

> public-trial guarantee." . . . However, it asserted that the *relief* "should be appropriate to the violation." . . . The Court did not refer to " structural error" in the opinion, because that term did not come along until later. Although it quoted from a dissenting opinion of Justice William Brennan, . . . the unanimous Waller Court did not adopt a rule of "automatic reversal" of conviction for every violation of the public trial right.
>
> To sum up, Waller does not fit well into the structural error category if "structural defects always lead to automatic reversal." . . .

State v. Ndina, 315 Wis.2d 653, 715-716, 761 N.W.2d 612, 642-3 (Wis.,2009) (Prosser, J. concurring) (citations to authority omitted -- italics in original). Thus, it is not clear that the Supreme Court will consider *any* instance of court closure to be structural error requiring a new trial. It follows that principles of finality should require that a defendant challenging his conviction on collateral attack should be required to prove that the court was closed, and that the closure was error, before obtaining relief.

For instance, in the present case, a handful of jurors were questioned in private at the defendant's personal request, to facilitate his stated interest in obtaining the most candid *voir dire* possible. The Supreme Court has suggested that such a closure might be proper. Press Enter. Co., 464 U.S. at 511-12 ("The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation

touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain. . . .The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process"). The Supreme Court has never held that acquiescing to a request like Morris,' without first justifying closure, is a structural error on a direct appeal, much less on a collateral attack.

Thus, this Court should exercise its discretion under St. Pierre to hold that a petitioner on collateral review is entitled to relief only if he shows that the closure was unwarranted. On the facts presented in this petition Morris cannot meet that standard.

### 3. ERROR WAS PRESERVED IN NEARLY EVERY CASE WACDL CITES TO SUPPORT ITS ARGUMENT FOR AUTOMATIC REVERSAL.

The State has argued here and in other cases that open court errors can be invited or waived. See Response to PRP at 14-27; State v. Wise, No. 82802-4 (Brief of Amicus WAPA). Specifically, Morris' lawyer specifically asked for private questioning outside Morris' presence. This was either invited error or a clear waiver.[2]

WACDL argues, however, that "[t]he fact that this issue is

raised for the first time in a PRP should make no difference to the outcome." Br. of WACDL at 3. In support of its argument WACDL cites Washington state cases as well as no fewer than 14 federal or foreign state cases involving structural error or open courtroom errors. It repeatedly argues that the federal and foreign cases were reversed without consideration of prejudice. This recitation of numerous cases is likely designed to suggest that reversal for open courtroom violations is common in other jurisdictions.

WACDL fails to note, however, that in nearly every federal or foreign state case cited in its brief, the error alleged on review was preserved in the trial court. Presley v. Georgia, __ U.S. ____,130 S. Ct. 721, 722, 175 L. Ed. 2d 675 (2010) (defendant's counsel objected to exclusion of defendants uncle from voire dire), U.S. v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (structural error for trial court to prohibit defendant choice of retained attorney from representing defendant after significant litigation in the trial court), Gomez v. United States, 490 U.S. 858, 109 S. Ct. 2237, 2248, 104 L. Ed. 2d 923 (1989) (defendants objected to jury selection conducted by magistrate lacking jurisdiction and on direct appeal

[2] See Com. v. Rogers, 459 Mass. 249, 91 N.2.2d 906 (2011) (Slip Op. at pages 8-9) ("the right to a public trial, like other structural rights, can be waived"

court determined error was not harmless given lack of judicial authority), Waller v. Georgia, 467 U.S. 39, 42, 104 S. Ct. 2210, 2213, 81 L. Ed. 2d 31 (1984) (suppression hearing closed over objection of one of co-defendants)[3], McKaskle v. Wiggins, 465 U.S. 168, 170-76, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (in right to self-representation case, defendant launched vociferous and repeated objections to stand-by counsel in the trial court), Gideon v. Wainwright, 372 U.S. 335, 337, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (in right to counsel case, petitioner asked trial court for appointment of counsel), Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (error preserved where trial before mayor, sitting as judge, had conflict of interest since he would benefit from fine imposed on the defendant and defendant had moved his dismissal under the Fourteenth Amendment, but the mayor denied the motion), United States v. Thunder, 438 F.3d 866 (8th Cir. 2006) (conviction reversed on direct appeal where trial court closed courtroom to public during child's testimony in child rape case over objection of the defendant and without a hearing), Judd v. Haley, 250 F.3d 1308, 1311-12 (11th

(citations omitted) – finding even if partial closure, the claim was waived.).

[3] It is important to note that the United States Supreme Court permitted the issue of whether the other co-defendant who failed to object to the closure was procedurally barred from seeking relief to be determined as a matter of state law.

Cir. 2001) (direct appeal from conviction for sexual offenses where court closed for testimony of child sex abuse victim -- case reversed based upon structural error - ("After the courtroom was cleared, Judd's attorney issued a lengthy objection, saying in part: Judge, we object to my client's constitutional rights being violated.")), Sustache-Rivera v. United States., 221 F.3d 8, 18 (1st Cir. 2000) *cert. denied*, 532 U.S. 924, 121 S.Ct. 1364, 149 L.Ed.2d 292 (2001) (on collateral review failure to submit issue of serious bodily injury instruction to the jury was not "structural error" and "actual prejudice" harmless error test of Brecht was not satisfied), McGurk v. Stenberg, 163 F.3d 470, 472 (8th Cir. 1998) (trial counsel's failure to inform a defendant charged with a serious crime of the right to trial by jury and failure to waive right to trial by jury constituted ineffective assistance amounting to structural error which permitted federal habeas relief[4]), U. S. ex rel.

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Waller v. Georgia, 467 U.S. 39, 50, 104 S. Ct. 2210, 2217, 81 L. Ed. 2d 31 (1984) (footnote 2).

[4] The court in McGurk noted that this type of structural error was very limited.

> As the foregoing discussion suggests, it will be a rare event when the failings of counsel rise to the level of structural error. As a practical matter, it is difficult to imagine situations that would trigger structural error analysis beyond the failure on the part of counsel to inform a defendant of certain basic rights, such as the right to trial by jury, to self-representation, or to an appeal as a matter of right. Thus, the narrow holding of this case is that failure on the part of counsel to ensure that mechanisms fundamental to our system of adversarial proceedings are in place cannot, under the reasoning of Sullivan, constitute harmless error.

McGurk v. Stenberg, 163 F.3d 470, 475 (8th Cir. 1998) (footnote 5).

Bennett v. Rundle, 419 F.2d 599 (3rd Cir. 1969) ("Here there was not only no acquiescence in the exclusion of the public but an objection - however it was phrased - to the court's action." (citing Levine v. United States, 362 U.S. 610, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960) (open court objection must be preserved)), State v. Sheppard, 182 Conn. 412, 413, 438 A.2d 125 (Conn., 1980) (direct appeal from conviction where defendant raised objection to closure of courtroom for testimony of children in child sex abuse prosecution – the error was preserved).

Thus, the cases cited in WACDL's own brief belie its argument that an open court issue must result in reversal when raised for the first time in a collateral attack. Most courts address this issue only if preserved at trial.[5] The reasons for requiring a contemporaneous objection were well-explained in State v. Ndina, supra.

> Categorizing the violation of the Sixth Amendment right to a public trial as structural error does not relieve a defendant of the obligation to enter a timely objection to a violation of the right *unless the defendant is not in a position to do so.*
>
> Normally, a defendant asserting violation of a

[5] Walton v. Briley, 361 F.3d 431 (7th Cir.2004) is the only case cited where the appellate court was willing to consider an unpreserved open court issue. In that case, however, it was not clear Walton had the opportunity to object to court hearings conducted in the evening after the building was secured. See State v. Ndina, *supra*. Walton had also exhausted his state court remedies prior to seeking federal collateral review. Walton differs markedly from the present case where the indications are that Morris sought out the proceedings in chambers.

> constitutional right must object at the time of the violation or forfeit the right to raise the issue later. In United States v. Olano, . . ., the Court declared that " 'No procedural principle is more familiar to this Court than that a constitutional right ... may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' " . . .
>
> No doubt there are situations in which the forfeiture rule does not apply because the defendant is not in a position to make a timely objection. ...
>
> In most of the Supreme Court cases identifying or discussing structural error, the defendant, like Waller, timely asserted his rights or timely lodged an objection. . . .The Supreme Court has not become indifferent to the importance of making timely objections.
>
> This case presents the challenge of reconciling the protection of an important Sixth Amendment right with the necessity of requiring the key players in a criminal proceeding to conduct themselves in a manner that promotes and preserves the orderly administration of justice. Timely objections are vital to the orderly administration of justice. A party's failure to make a timely objection ought to entail a cost to the party unless the failure is justified by the circumstances, or the judiciary is *required* to vindicate a higher value. If a deficient party is rewarded for its lack of diligence, it will not be diligent.

State v. Ndina, 761 N.W.2d at 643-44 (Prosser, J. concurring) (citations to authority and footnotes omitted). This reasoning should be persuasive as to both direct appeals and collateral attacks.

**4. THE RELEVANT ISSUE HERE IS THE EFFECTIVENESS OF TRIAL COUNSEL, NOT THE EFFECTIVENESS OF APPELLATE COUNSEL.**

WACDL cites to In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) to support the contention that the

ineffective assistance of appellate counsel on direct review suffices to permit a defendant to raise the issue of courtroom closure on collateral attack. In Orange, there would have been no tactical reason for trial counsel to withhold the objection to the removal of family members. In contrast, as demonstrated by Morris's request not to be present when the jurors were examined as to personal issue, trial counsel in the present case had a tactical reason to have jurors be more forthcoming in private. State v. Momah, 167 Wn. 2d 140, 155, 217 P.3d 321 (2009) *cert. denied*, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010) (recognizing tactical decision in having portion of jury selection in chambers).

Another appellate court decision cited by WACDL considered an unpreserved open court claim in *voire dire.* Owens v. U.S., 483 F.3d 48 (8th Cir. 2007). Owens involved a day-long closure of *voir dire* in state court. Neither Owens nor his lawyers objected. The federal appellate court, in discussing the failure to object, noted that a procedural default may not be appropriate if trial counsel had been ineffective. The court then remanded for hearing to determine extent of closure and counsel's reasons for not objecting to the closure.

The Owens case is notable for several reasons. First, it confirms that a contemporaneous objection is *generally* required to

preserve an open courts claim. Second, it shows that an open courts claim cannot be bypassed by a reviewing appellate court without the petitioner establishing ineffective assistance of trial counsel. Third, it notes that a factual hearing is required to determine the issue.

This highlights another curious aspect of WACDL's brief. WACDL devotes its entire brief to proving that *appellate* counsel was ineffective, and says not a word about *trial* counsel.[6] However, even if Owens is taken at face value, the relevant inquiry is whether trial counsel was ineffective in failing to object to a closure. If trial counsel has legitimate strategic reasons for seeking closure then error was invited (for good reasons) so the issue should be barred as a matter of law for the appellate lawyer.

### 5. THE REMEDY SHOULD SUIT THE CLOSURE VIOLATION AS PROVIDED IN WALLER.

Of the cases cited by WACDL, United States v. Canady, 126

[6] Appellate counsel was one of the most experienced and respected members of the criminal defense bar in Washington. He has successfully argued numerous criminal cases on appeal as a lawyer for individual defendants, and as a frequent author of amicus briefs for WACDL. See http://www.markmuensterlaw.com/Practice-Areas/Appellate-Decisions.shtml. It should not be assumed that Mr. Muenster was incompetent. Indeed, the fact that he failed to raise this claim on appeal suggests that private *voir dire* of jurors in sex abuse cases was widely regarded by defense lawyers as an acceptable and desirable practice in Washington state before this Court's recent decisions. *See also* Bell v. Jarvis, 236 F.3d 149, 175 (4th Cir. 2000) (habeas petitioner failed to demonstrate that appellate counsel's decision not to pursue the public trial claim "fell below an objective standard of reasonableness" *citing* Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

F.3d 352 (2d Cir. 1997) is the only case from other jurisdictions involving a challenge to closure raised for the first time in collateral attack. In Canday, following conclusion of testimony in a bench trial, the trial court had stated it would notify the parties of the verdict. The verdict was mailed to the counsel. Canday, 126 F.3d at 359. Defendant failed to raise challenge on direct appeal of defendant's right to presence and right to public trial. The Court in Canday, held the district court's mailing of verdict was structural error. Canday, 126 F.3d at 363. However, the remedy was not reversal.

> Canady argues that the only remedy is a new trial on the merits. We disagree. In Waller, the Supreme Court addressed the question of what remedy was appropriate when a defendant's public trial right has been violated and concluded that "the remedy should be appropriate to the violation." Waller, 467 U.S. at 50, 104 S.Ct. at 2217. The Court reasoned that what was required where a suppression hearing was conducted in violation of the Sixth Amendment was remand for a new suppression hearing, finding that "a new trial presumably would be a windfall for the defendant, and not in the public interest." Id.

United States v. Canady, 126 F.3d 352, 364 (2d Cir. 1997). The court determined that reversal of the conviction and remand for announcement of the verdict was the appropriate remedy. *See also* State v. Infante, ___ N.W. ___, A10-692, 2011 WL 1466361 (Minn. Ct. App. Apr. 19, 2011) (exclusion of defendant's sister and child

during closing argument raised for the first time on direct appeal merited remand for evidentiary hearing for findings under Waller, *citing* State v. Bobo, 770 N.W. 129, 139 (Minn. 2009) (stating that "retrial is not required if a remand will remedy the violation") and State v. Biebinger, 585 N.W.2d 384, 385 (Minn.1998) (stating that "the appropriate initial remedy" after closure without necessary findings "is a remand for an evidentiary hearing, not retrial").

Morris sought the chambers interview of the jurors who sought privacy. Morris should bear the remedy of a windfall of new trial.

## V. CONCLUSION

The case cited by WACDL's amicus curiae do not support that the present case involves structural error for which reversal is required. Morris waived his personal presence and his counsel used the selection of jurors in chambers for his benefit. For the reasons provided herein as well as the State's prior briefing, Morris's personal restraint petition must be denied.

DATED this _____ day of April, 2011.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: /s/ - Erik Pedersen – electronic signature
ERIK PEDERSEN, WSBA#20015
Senior Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [ ]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: David B. Zuckerman, Attorney for Petitioner, addressed as 1300 Hoge Building 705 Second Avenue, Seattle, WA 98104, Jeffrey Ellis, Counsel for Amicus WACDL, Law Office of Alsept and Ellis, 621 SW Morrison Street, Suite 1025, Portland, Or, 97205-3813, and Suzanne Lee Elliott, Counsel for Amicus WACDL, 705 Second Avenue, Suite 1300, Seattle, WA 98104.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this _____ day of April, 2011.

_____
KAREN R. WALLACE, DECLARANT